IN THE COURT OP APPEAL OP SWAZILAND

APPEAL NO. CA/2/82

In the matter between:-

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VARIETY INVESTMENTS (PTY) LTD. Appellant

versus

MOSES BOY MOTSA Respondent

CORAM: YOUNG J.A.

MAHOMED J.A.

AARON J.A.

JUDGMENT

Delivered on 5th January, 1983

YOUNG J.A.

The facts of the case are set out in the judgment of Aaron J.A. which I have had the advantage of reading.

Defence on 15-year lease

I agree with Aaron J.A. and for the reasons stated by him that the opposing affidavit failed to disclose a defence based on the 15-year lease. I would only add that in an application for summary judgment, the court always has a discretion to permit a defendant to supplement an imperfect affidavit in order to elucidate what the defence really is: Hugh Holdings (Pty) Ltd. v. Gamberini 1968(3) SA 157. At no stage of the hearing of this matter had there been an application to furnish evidence of compliance with S30 of the Transfer Duty Act No. 8 of 1902. Such an application must undoubtedly have been granted.

Defence based on a monthly; tenancy

With the greatest respect I am unable to agree with Aaron J.A. that a triable issue does emerge on the opposing affidavit.

In my opinion, by the law of Swaziland -"A man who enters upon a void lease is a tenant at will under the terms of the lease in all other respects except the duration of time".

Woodfall : Landlord & Tenant, 27th Ed. para 672. 459; Halsbury 4th Ed. Vol. 27 para 167; Rubin v. Botha 1911 WLD 99; Hart v. Hart 1902 TH 247 Handerson's Transvaal Estates v. Bloom 1911 WLD 88.

The case in suit is, therefore, I think a tenancy at will. The question is how this particular tenancy was terminable. The answer in my judgment is to be found in paragraphs 171, 172 and 174 of Halsbury. These paragraphs provide (as far as relevant):

"171 Determination of a tenancy at will. A tenancy at will is determinable by either party on his expressly or impliedly intimating to the other his wish that the tenancy should be at an end. Until the intimation is thus given the tenant is lawfully in possession, and accordingly the landlord cannot recover the premises in an action for the recovery of land without the previous demand of possession or other determination of tenancy .....

172. Determination by landlord. Anything which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the

determination of the landlord's will. Thus, the landlord may expressly demand possession, or state that the tenant is in against his will, or send for the keys .....

The tenancy is impliedly determined by the landlord when he does any act on the premises which is inconsistent with the continuation of the tenancy, for example when he re-enters to take possession, or puts in a new tenant, or cuts down trees or carries away stone, the trees or stones not being excepted from the demise, and also when he does any act off the premises which is inconsistent with the tenancy, as when he grants a lease of the premises to commence forthwith. An act done off the premises, however, does not terminate the tenancy until the tenancy has notice of it".

In his South African Law of Landlord and Tenant Dr. Cooper says at page 57:

"3. At the will of the lessor. A lease may be at the will of the lessor. The lessor may terminate such a lease at any time he wishes to do so. Should he not do so the lease terminates at the lessor's death. Upon the termination of the lease the lessee should be given reasonable time im which to vacate .. .. "

Ample authority is cited for that statement of the law. It will be observed that the laws of England and South Africa (and hence of Swaziland) are substantially identical. The termination of Variety Investments' tenancy at will depended therefore, on two conditions being present: (i) An express or

implied intimation by Carmichael Investments that it wished to end the tenancy; (ii) A reasonable time for Variety Investments to vacate.

Now, in my Judgment, it is quite impossible to contend that those two conditions were not fulfilled: (i) Carmichael Investments, to the knowledge of Variety Investments, sold the premises - in itself, the clearest intimation to Variety Investments that the tenancy at will was to end. Moreover, and again to the knowledge of Variety Investments, in the sale agreement Carmichael Investments stipulated for a lease in favour of Variety Investments for a period ending 6 months after the month in which transfer of the property was registered (clause 14). It was obvious that the tenancy at will was to come to an end pari passu with transfer. Whether with or without prejudice, Variety Investments occupied the premises in terms of the clause 14 stipulation. (ii) Notice of termination of the tenancy at will was abundant. In terms of time the notice stretched from 3rd

October 1979 (date of sale) to 28th February 1982. The contrary would appear to be unarguable.

However, it is said that there is decisional authority which establishes the legal principle that in the case of a tenancy at will, if a pattern in the payment of rent is followed, e.g. monthly or yearly, over a period of time, then the tenant becomes a monthly tenant or, presumably, a yearly tenant as the case may be. In other words, because rent has been paid and received monthly, the tenancy cannot be determined except on a month's notice. Reliance is placed on Raner & Bernstein v. Armitage, 1919 WLD at 62; Morrison v. Standard Building Society. 1922 AD

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at 242 and Cooper 44 Text to note 44, Before turning to those cases, I would point out that, if such a principle does exist, it cannot possibly have application in the circumstances of this case. On all the authorities, a man who enters upon a void lease is a tenant at will under the terms of the lease in all other respects except the duration of time. In the 15-year lease which turned out to be a void as contrary to the statute, the rental of E250 (with an escalation clause) was payable monthly. That rental provision became a term of the tenancy at will. There was, therefore, no need, nor indeed scope, to invoke an implied term nor any rule of law as suggested.

It would be remarkable if the legal position were otherwise. To metamorphose the tenancy at will into a monthly tenancy would be to contradict the principles of consensus and autonomy in contract. It might work injustice; as it might not be in the interests of one or other or both of the parties to exchange the "reasonable notice" of the tenancy at will for the fixed notice of the monthly or yearly tenancy. The fact that rental was payable monthly under the tenancy at will, may no doubt be very relevant to what is reasonable notice, but,in my view, that is no basis for implying a term in the contract contrary to an existing term (even if tacit) covering the matter.

Raner & Bernstein v. Armitage. In this case there was a lease for 5 years at a monthly rental of £70. After two years it was discovered that the lease was void for want of due formality. Ejectment was claimed. It was argued that the tenant was a tenant at will in the circumstances. Ward J apparently rejected that

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submission. In any event he does no deal with a tenant at will in his judgment. The learned judge; reasoning is, with respect, confused and unsatisfactory. He reined the conclusion that,as there had been payment of a monthlyental for the previous two years before discovery of the invality of the lease, here was a monthly tenancy. As Gooper pointsit p. 58 this was no basis for inferring a monthly tenancy. The glish rule on the creation of a tenancy from year to year by appriate words does not assist Variety Investments: see Halsburira 177.

It follows, in my judgmentat Raner & Bernstein is not in point and provides no authority the propositon that the tenancy at will becomes a monthly tenanoforrison v. Standard Building Society. This was also an action ejectment, in the course of which it emerged that the lease oid for want of execution before a notary, Morrison had ed into a lease for 5 years with an option to renew for a full 5 years. Six month's notice of renewal was required. Noticenewal was not given but after some negotiations the buisociety agreed to a renewal.

The question before the court wher there was renewal or a new agreement. In the course dudgment holding that the intention of the parties was to the existing lease, Wessels JA remarked (page 242):

"There must be clear prhe intention on the Part of lessor and lessee to ma contract and not to renew the existing agreement ne court can hold that there exists a new contract vexact terms of the void contract. If then the lease was a nullity, the renewal was a nullity red no rights on the lessee

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under the old lease. Either lessor or lessee could at any time have repudiated the lease. When the renewal was entered into neither party knew that there was no legal lease in existence. If the lessor had known the true position he might have refused to renew. As, however, the lessee was allowed to continue in occupation, and as a monthly rent was accepted from him the true legal position is that there existed after July 1950, a monthly tenancy between the parties. The society was, therefore, within its rights in April 1931 to give notice to the appellant that he was to quit the premises two months after 1st May 1931".

Wessels JA quotes no authority for the underlined proposition, but I notice from the printed argument of counsel for the appellant that there was a submission that "Acceptance of rent after the termination of the lease constituted a new monthly tenancy. See Raner & Bernstein v, Armitage". As I have already indicated Raner & Bernstein does not deal with a tenancy at will. And Wessels JA does not mention the subject. In my opinion, there are at least three reasons why the dictum of Wessels JA cannot be regarded as authoritative in the present case:

(i) The dictum was alio intuitu and not directed to a tenancy at will. It would seem that Wessels JA had in mind the decision in Raner v, Bernstein,

(ii) If the dictum did relate to a tenancy at will, it was per incuriam. The court was not referred to the relevant authorities, nor was the issue fully argued or dealt with on principle. Note the misuse of the word "allowed",

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(iii) The dictum was obiter. This was apparently not an issue raised for decision. It seems that two issues only were raised on this aspect of the case : a new agreement of lease and a waiver.

The criticism of Morrison v. Standard Building Society by Cooper at page 58 is not without substance. In any event this Court is not bound by the dictum or even the decision in Morrison, and I would not follow it.

I would therefore, dismiss the appeal insofar as it relates to the eviction order.

The Rental Claim

I agree with Aaron J.A. that a triable issue was exposed on the opposing affidavit. The defendant admitted an arrangement (albeit without prejudice to its claim for a 15-year lease) whereby the rental would be increased to E1000 for the period ending February 1980. In regard to the rental for March, the plaintiff alleged a special agreement to extend the six month period for a further month but at an increased rental of E2000. Although the opposing affidavit does not deal specifically with the extension alleged by the plaintiff, it seems to me to be implicit in the argument advanced in para. (b)(iii) of the opposing affidavit that the existing rental of E1000 was tacitly extended to March by reason of the retention by the plaintiff of the extra E1000 paid in February. Here was a triable issue. I am satisfied that summary judgment should not have been granted in respect of the claim for rent. The appeal on this point must be allowed and the issues

remitted for trial to the High Court.

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Costs

Although the success of the appeal on the rental issue would ordinarily carry the costs of appeal, I think that in the special circumstances of this case the costs (including the costs of appeal) should be reserved to the trial judge. There is some ground of suspicion that the opposition to the application for summary judgment was for the purposes of delay. It may well turn out that the defendant does not pursue his defence at the trial. Aaron J.A. says in his judgment that in such event the plaintiff's remedy will be to apply to the trial court for an appropriate order as to costs. But the only court that will be available to the trial judge at that stage would be to award attorney and client costs to the plaintiff. The extra costs are unlikely to add up to much. In the meantime the defendant will have achieved his objective of delay (should that be the case) together with the costs incurred by him.

A passage in the judgment in the case of Roscoe v. Stewart 1937 CPD 138 seems to provide some guidance. There Sutton and Centlivres J J said:

"In as much as the defendant put the matter before the court in a way which is by no means satisfactory, in setting aside the summary judgment and remitting the matter to the magistrate, we think that both the costs of appeal and of the application for summary judgment should be costs in the cause".

In Herbert v. Steele 1953(3) SA 271 (T) de Villiers J. (with whom Rumpff J. agreed) said : at 275.

"The defendant's affidavit, as I have stated above, is very cryptic and it is in some respects not as explicit

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as it should have been. Although it should not be scrutinised with the same strictness as a pleading, it must, however, be drawn with care and completeness. According to the rule it must disclose fully the nature and the grounds of the defence. This is all the more necessary as a plaintiff is not allowed to refute any allegations at that stage. It may turn out at the trial that the defendant's opposition to the application for summary judgment was not bona fide and was put forward for the purpose of delay only. I think this court should follow the procedure adopted in Roscoe v. Stewart and make the costs of appeal and of the application for summary judgment costs in the cause".

That passage seems to me to be apposite here,, See also Shingadia v. Shingadia 1966(3) SA 24 (R) where a similar order as to costs was made. I would therefore, order that the costs of the application for summary judgment and of the appeal be reserved to the trial judge.

However, as Aaron J.A. (with whom Mahomee J.A. agrees) takes a different view, the order of this Court will be in terms of that proposed by Aaron J.A.

Signed

DENDY YOUNG JUDGE OF THE APPEAL COURT

AARON J.A.

Appellant was the defendant in the court below, and appeals against a summary judgment which was granted against it. For

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convenience the Appellant will be referred to in this judgment as the Defendant, and the Respondent as the Plaintiff.

The summary judgment was for the evicbion of the Defendant from certain premises which it occupied for the past six years, for payment of the sum of E1000; being the unpaid balance of rental for the month of March, 1982, for interest on this amount, and for costs for suit.

The property in question was owned from 1973 to 1981 by a Company named Carmichael Investments (Pty) Ltd. Plaintiff alleged in his Particulars of Claim that he had purchased the property from Carmichael Investments (Pty) Ltd. in October, 1979, and had taken transfer of the property on 3rd August, 1981. At the time of the sale Defendant occupied portion of the property and Clause 14 of the Deed of Sale provided that :

"Variety Investments (Pty) Ltd. is the tenant of Variety Stores in the premises sold, and it is recorded that it shall have the right of occupation of such premises for 6 calendar months after the month in which transfer is registered at a rental of E1,000.00 (one thousand Emalangeni) per month, payable in advance".

As transfer was registered in August 1981, the 6-month period referred to in Clause 14 commenced on 1st September 1981 and terminated on 28th February 1982.

Plaintiff alleges that during February 1982, he agreed to grant Defendant a further period of one month's occupation at a rental of E2000.00 per month. That would have been for the month

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of March. He however calculated the six-month period incorrectly: in the belief that it terminated at the end of January, and that the one month's extension related to February, he demanded payment of the extra E1000 during February. This was paid by Defendant on 3rd February, 1982. On 2nd March 1982, still labouring under the mistaken impression that the extended lease period had expired at the end of February, Plaintiff wrote to Defendant pointing out that it had failed to vacate the premises and called upon it to do so within 24 hours after receipt of his letter; failing which he indicated that application would be made for the Defendant's eviction.

Defendant did not vacate, nor did it pay any rent for March. Plaintiff did not however proceed with his threatened application, as he apparently now realised that his demand had been premature. He accordingly waited until the end of March, and when Defendant had still not vacated by that date, he caused summons to be issued on 2nd April, without any further notice to Defendant.

In his Particulars of Claim, Plaintiff pointed out his error in miscalculating the rental period, and on the basis that the extra E1000 paid on 3rd February should have been credited towards the March rental, he claimed the sum of E1000 as the balance of the agreed rental for that month.

Also included in the summons was a claim for payment of such sum as might be due by Defendant to Plaintiff at the time of vacating the premises, but as summary judgment was not granted in respect of this particular claim, nothing more need be said about this.

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When Plaintiff subsequently applied for summary judgment, Defendant filed a fairly lengthy opposing affidavit, in which a number of defences were raised to both the claim for eviction, and the claim for the balance of March rental. It will be convenient to deal separately with these two issues, and to consider under each head the particular defences relating thereto, Eviction Claim:

The main opposing affidavit was deposed to by Violet Carmichael, a director of Defendant company. The first point taken was that the summons and Particulars of Claim were materially defective, because Plaintiff's cause of action was based on Clause 14 of the Deed of Sale, and there was no allegation that Defendant, which was not a party to the Deed of Sale, had become a party to this arrangement. The affidavit went on to aver as a matter of fact, that "at no stage did Defendant adopt, accept or ratify any agreement or stipulation, made by other parties between themselves".

There is in my view no substance to this point. It is misconceived because it regards Plaintiff's cause of action as "based on" clause 14, of the Deed of Sale, Plaintiff has alleged that he is the registered owner of the property, and that Defendant is in occupation thereof. That is basically sufficient to enable a plaintiff to claim an order of eviction against an occupier, unless the occupier can set up a contract which entitles it to remain in occupation. It is not even necessary for an owner to allege that the defendant is in wrongful or unlawful possession, because ownership of property entitles the owner to possession thereof. (See Graham v. Ridley, 1931 TPD 476; Krugersdorp Municipal Council v. Fortuin, 1965(2) SA 335 (T)).

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In the present case, Plaintiff did not content himself with a bare allegation that he was the owner of the premises, and that Defendant was in unlawful occupation: he went on to refer in his summons to a contract of lease, and averred that it had expired by-reason of effluxion of time. When he did so, Plaintiff was now however basing his cause of action on the lease; he was merely anticipating a defence that there was a lease in existence, and meeting that defence in his Particulars of Claim, He referred to the lease, not because he relied thereon, but on the contrary, in order to show that it had fallen away, and no longer afforded the Defendant an answer to his claim.

It follows that it cannot avail the defendant in such a case to attack the existence of the lease referred to by the Plaintiff, In doing so, it attacks not the foundation of the plaintiff's case, but something which was referred to only because it might constitute a defence. Defendant, in other words, is simply confirming that the particular lease referred to in the summons cannot serve as the basis for any possible defence.

Defence based on a 15-year lease

Once Defendant denied that Clause 14 of the Deed of Sale had given it any rights of occupation as against Plaintiff, its defence had to be based upon some other arrangement in terms of which it was entitled to occupy the premises. The substantial defence raised by the Defendant was that it was the lessee of the premises under a contract which it had entered into in 1975 with Carmichael Investments (Pty) Ltd, in terms whereof it was entitled to remain in possession of the premises for a period of 15 years.

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For the first 8 years the rental was said to have been fixed at E850 per month and thereafter it was to be increased by 15%. This defence failed in the court "below, the learned Judge holding

that in terms of Section 30 of the Transfer Duty Act No. 8 of 1902, no lease is of any force and effect against creditors or any subsequent bona fide purchaser of the property unless it is registered against the title deeds of the property. He found that it had not been alleged by Defendant that these conditions had been fulfilled in this case, and therefore that no defence had been disclosed.

The legal effect of the provisons of the Transfer Duty Act was not challenged in argument "before us in this court, but it was contended that there was sufficient averment in the opposing affidavit to the effect that these conditions had been fulfilled, and accordingly that the trial judge had erred in finding that no defence had been disclosed.

This is then a convenient stage to consider how far a defendant need go when he takes the course of opposing an application for summary judgment "by filing an opposing affidavit. Rule of Court 32(3) requires him to:-

"satisfy the Court ..... that he has a bona fide defence to the action".

Furthermore:-

"Such affidavit .... shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor".

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There has been much discussion in the reported cases in South Africa as to how far a defendant need go before he can be said to have "satisfied" the Court, and as to what is meant by the requirement that the affidavit should "fully" disclose of the nature and grounds of the defence. In Maharaj v. Barclays National Bank Ltd, 1976(1) SA 418 (AD), Corbett, J.A. said (at page 426 A - E):-

"Where the defence is based upon facts, in the sense that material facts alleged "by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors) has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is "based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a

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bona fide defence. (See generally, Herb Dyers (Pty) Ltd v. Mohamed and Another, 1965(1) SA 31 (T) ; Caltex Oil (SA) Ltd v. Webb and Another, 1965(2) SA 814 (N); Arend and Another v. Astra Furnishers (Pty) Ltd, 1974(1) SA 298 (C) at pp. 303 -4; Shepstone v. Shepstone, 1974(2) SA 462 (N)). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See Estate Potgieter v. Elliott, 1948(1) SA 1048 (C) at p. 1087; Herb Dyers case,

supra at p. 32)".

Another instructive passage appears in the case of Gilinsky v. Superb Launderers and Dry Cleaners, 1978(3) SA 807(C), a Full Bench decision of the Cape Provisional Division:

"The Courts - quite rightly - never tire of pointing out the drastic consequences of a summary judgment order, and that the natural corollary to this is that such order will only be given if the court can be persuaded on the evidence before it that plaintiff has what has sometimes been referred to as an unanswerable case

It is important to note that a decision as to whether a plaintiff's case is unanswerable or not must be founded on information before the Court dealing with the application.

This information is derived from the plaintiff's statement of case, the defendant's affidavit or oral evidence, and any documents that might properly be before the Court. It would be inappropriate to allow speculation and conjecture as to the nature and the ground of the defence to constitute a

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substitute for real information as to these matters. On the other hand, even if a Court concludes that such information as is disclosed by defendant in his affidavit is not a sufficient compliance with the provisions of Rule of Court 32(3), it may nevertheless consider that it is sufficient to raise a doubt as to whether plaintiff's case can be characterised as "unanswerable",, In that case the Court would in the exercise of its discretion refuse summary judgment" (page 81-1).

Although it has frequently been said that a defendant need not, in his opposing affidavit, formulate a defence with the precision which would be required in a plea, it is also true that he must not be too terse. The following remarks of Colman, J. in Breitenbach v, Fiat SA (Edms) Bpk. 1976(2) SA 226 (T) at page 228E, set the limits of what need be said, and what need not be said:

"Another provision of the sub-rule which causes difficulty, is the requirement that in the defendant's affidavit the nature . and the grounds of his defence, and the material facts relied upon therefore, are to be disclosed "fully". A literal reading of that requirement would impose upon a defendant the duty of setting out in his affidavit, the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable, however that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree, subject to one condition, with the suggestion by Miller, J, in Shepstone v. Shepstone, 1974(2) SA 462(N)

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at pages 466m- 407, that the word "fully" should not be given its literal meaning in Rule 32(3) and that no more is called for than this, that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will consti ute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides".

That being what the law requires of a defendant's opposing affidavit, I proceed to consider what was said in the opposing in this case regarding the alleged 15 year lease.

In order to establish a contract of lease which would give it a valid right of occupation against the plaintiff, in accordance with the provisions of Section 30 of the Transfer Duty Act, the defendant

would at the trial have to allege and prove:-

(i) that the contract was in writing, and had been executed before a notary public; and

(ii) that it had furthermore been registered against the title deed of the property in question.

The first of these requirements is a necessary prerequisite to the validity of any lease for a period in excess of 10 years; if not notarially executed, such a lease is not valid even between the two contracting parties. The second requirement is an additional requirement if the lease is to be binding on creditors and successors

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in title of the landlord. Clearly, it would not be sufficient for a defendant, when asserting a lease against a successor in title, merely to allege and prove that there had been notarial execution (thus satisfying the first requirement), without going on to allege and prove that the lease had also been registered against the title deeds of the property (so as to satisfy the second requirement).

If these are the matters which must be alleged and proved by defendant at the trial, then it follows that these two matters must both be alleged in an opposing affidavit in summary judgment proceedings, even though the need for proof is at this stage dispensed with.

In the opposing affidavit filed in this case, the deponent Violet Carmichael dealt with the conclusion of the lease in 1975, stated that Defendant had at all times faithfully discharged its obligations under the lease, and then went on to deal with the position that arose when the property was sold. She stated :-

(vi) Furthermore, I state that even though the aforesaid lease in respect of the said premises, as held by Defendant, has at all material times been of full force and effect, to which lease plaintiff became bound in law when he acquired the said premises in August 1981, Plaintiff breached the provisions of the said lease and demanded excessive rentals of E1000.00 and more".

Mr. Zar, who appeared for Appellant, argued that the phrase "has at all material times "been of full force and effect" amounted to an averment by Defendant that the lease had been notarially

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executed, so as to satisfy the first requirement of Section 30, and that the words "to which lease plaintiff became bound in law when he acquired the said premises in August 1981", was a sufficient averment that the lease had been registered against the title deeds of the property, so as to satisfy the second requirement of Section 30. He was unable, in answer to a question by the Court, to point to any other averment in the opposing affidavit which could be read as alleging that either of these requirements had been fulfilled.

In my judgment, these allegations are not a sufficient averment of these two requirements even in an opposing affidavit in summary judgment proceedings. The allegation that plaintiff became bound by the lease when he acquired the property is not so much an allegation of fact, as a conclusion of law. Mr. Zar invited the Court to hold that this statement was at least consistent with an intention to allege that the Plaintiff had become bound by the lease because it had been registered against the title deed. But to do so would be "to allow speculation and conjecture as to nature and ground of the defence to constitute a substitute for real information "on this point. It is possible that the deponent, or whoever prepared the affidavit for her to sign, was mistaken as to what the legal position was after the property had been transferred and therefore had no intention

of averring that the lease had been endorsed against the title deed.

The deponent to the affidavit may have omitted those material averments through inadvertence, but she may equally have omitted them because she was unable to make them upon oath.

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It is not the duty of the Court in such circumstances to remedy the deficiency by assuming that the material facts were inadvertently omitted.

Despite the judicial pronouncements that a party need not set out his evidence in full, one would have expected Defendant to annex to its opposing affidavit either a copy of the notarially executed lease, or a copy of the title deed of Carmichael Investments (Pty) Ltd, showing the endorsement that the property was burdened by a 15year lease. But even if Defendant can be excused for not annexing these documents on the ground that they constitute evidence, and it is not required to produce its evidence at this stage, there is no adequate reason why an express allegation of their existence should not at least have been made. As matters now stand, the Court is left to speculate, because the affidavit has not disclosed the relevant material facts upon which a conclusion of law has been based.

In my view the learned judge a quo was correct in holding that the opposing affidavit had not disclosed a defence based on the existence of a 15year lease which bound the Plaintiff.

Defence based on a monthly tenancy

In this Court Mr. Zar argued a further point which had not been raised in the court below, either in the opposing affidavit or in argument. As an alternative defence, in the event of it being held that insufficient averments had been made to disclose a defence that Plaintiff was bound by the 15-year lease, he contended that if that lease was invalid, then the occupancy of the premises by the Defendant, together with the acceptance of

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rental from it, had brought into being a monthly tenancy. If this was so, the argument ran, then it would have been necessary for such tenancy to be terminated by the giving of a reasonable notice efore Defendant could be called upon to vacate the premises. As it was clear from the Particulars of Claim that Defendant had not been given such a notice, he argued that a defence to the claim for eviction had been disclosed.

Legal support for this argument can be found in a number of early decisions in the Transvaal. In Rubin v. Botha, 1911 WLD 99, a person occupied property under " a lease" which the parties originally thought was a valid contract. Some three years later, they realised that the agreement was null and void as it had not been notarially executed. The point at issue was the basis upon which the occupier was entitled to compensation for improvements, but in the course of the discusiion, the court considered the relationship between the parties during the period that the premises had been occupied; more particularly, whether the occupier had been a possessor or a tenant. In the local division, Smith, J, held that the occupier had been a tenant at will. When the matter went on appeal (1912 AD 114) Innes, J.A. commented that ""this so-called tenancy arose by operation of law, without the knowledge and contrary to the wish of either party" (at p. 124). See also Henderson's Transvaal Estates v. Bloom, 1911 WLD 88.

In Raner & Bernstein v. Armitage, 1919 WLD 58, it was held that the relationship between the parties was a tenancy, but as there had been a pattern of paying and accepting rental on. a monthly basis, the tenancy was not one at the will of the landlord, but a monthly tenancy. This

was again held in the case of

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Morrison v3. Standard Building. Society, 1932 AD 229. See particularly the judgment of Wessels, J.A. at 239 - 242,

I turn now to consider whether this defence has been disclosed by the opposing affidavit. There are two possibilities to be considered :-

Either (i) that the 15- year lease had not been notarially executed, and was therefore invalid even before the sale of the property to Plaintiff. In such event as there was a clear pattern of rental having been paid on a monthly basis, the defence would be that a monthly tenancy would have come into operation between Carmichael Investments (Pty) Ltd and the Defendant during 1975, and that when the property was sold to Plaintiff, he bacame bound by the tenancy because of the operation of the doctrine huur gaat voor koop;

or (ii) that it had been notarially executed, but not registered against the title deeds of the property. In this event, it would have been a valid contract between Carmichael Investments (Pty) Ltd. and Defendant until the property was transferred to Plaintiff, but would then have conferred no rights on Defendant against the Plaintiff. The doctrine of Huur gaat voor koop would not operate because of the statutory provision. When Defendant subsequently paid rent to Plaintiff, Plaintiff thought it was

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being paid in terms of Clause 14 of the Deed of Sale, while Defendant thought it was under the contract it had concluded with the previous owner. The defence would have to be that a monthly tenancy was created at this stage.

Mr. Zar, in his argument did not commit himself particularly to either version, but submitted that in either event, when Defendant paid a monthly rental to Plaintiff during the six month period after transfer had been given, a monthly tenancy was created. I am not sure that, in the second of the two possible cases outlined above a monthly tenancy between Plaintiff and Defendant would have been created, but I consider it arguable that in the first case, Plaintiff may well have become bound by a monthly tenancy that had previously come into existence between Carmichael Investments (Pty) Ltd and the Defendant,

It is necessary in assessing whether such a defence has been raised, to consider what has been said about the payment by Defendant of rental to Plaintiff. It is common cause on the papers that the rental paid was not the E850 per month provided for in Clause 14 of the Deed of Sale. If it was in fact paid in terms of the Deed of Sale, this would mean that Defendant had accepted the benefits and obligations created by that agreement. This is what Plaintiff alleges, and it would negate any defence based on the existence of a monthly tenancy.

But in summary judgment proceedings, in determining whether a bona fide defence has been disclosed, the court cannot simply accept the Plaintiff's allegation; it must consider the

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Defendant's affidavit. Mrs, Carmichael clearly and expressly denies having become a party to the agreement referred to in the Deed of Sale. She states that:-

"At no stage did Defendant adopt, accept or ratify any agreement or stipulation made by other parties between themselves, without Defendant's knowledge or consent, as has happened in the instant case, with regard to the said Clause 14 of the said Deed of Sale".

She also explains the payment of E1000. First she refers to the lease, to which she alleges "Plaintiff became bound in law when he acquired the said premises in August 1981". Then she goes on to state:-

"Plaintiff "breached the provisions of the said lease and demanded excessive rental of E1000 and more.

I respectfully state that Defendant was desirous of coining to some reasonable settlement with Plaintiff, who had now become the new landlord, and pending such negotiations, Defendant's manager duly paid the demanded amount of E1000 to Plaintiff, but the said payment was made expressly, without prejudice to any of Defendant's rights under the aforesaid lease referred to in the previous subparagraphs.

However, it was at all times a clear understanding between Plaintiff and Defendant that, insofar as the period of the unexpired duration of the lease was concerned, it was negotiable, and that Defendant would be entitled to the occupation of the said premises for the full tenure of

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of the balance of the period of the same".

These passages sufficiently disclose an intention by Defendant to deny any acceptance by it of the six months lease mentioned in Clause 14 of the Deed of Sale, and to provide an explanation as to why the sum of E1000 was paid each month as rental, Mr. van Heerden, who appeared for Plaintiff, pointed out in argument that Mrs. Carmichael's explanation was inconsistent with what she had written in two letters, copies of which had been annexed by Plaintiff to its Particulars of Claim. On 1st February 1982 she had written:-

"Enclosed please find cheque for E1000 (one thousand Emalangeni) being rent for the month of February 1982".

A few days later, when Plaintiff had asked for a further E1000 as February rental (a demand which in his Particulars of Claim he admits was prematurely made) she wrote another letter referring to this demand and said:-

"Would you kindly let us know in writing the basis for your demanding this further amount in rental when our rental is E1000 per month." (Emphasis supplied).

Mr. van Heerden contended that these two letters, and particularly the words emphasised, indicated that the rental of E1000 per month was not being paid under protest and without prejudice. In answer to this, Mr. Zar argued that the court did not have all the evidence before it, that the letters referred to had been written at the end of the six month period, and that the evidence might well disclose an earlier letter in which Defendant had expressly reserved its rights in respect of all future monthly payments.

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In my view Mr. Zar's argument is sound. The Court could not at this stage investigate the merits of a defence, nor would it be justified in finding that the defence raised was not bona fide. It

follows that from the papers before the Court, it would seem that Defendant has an arguable defence, in that if the 15-year lease is found at the trial to have been invalid, and if Plaintiff fails to prove that Defendant agreed to a 6 month lease at E1000 a month, Defendant may still be able to establish that it had been occupying since 1975 under a monthly tenancy, that this became binding on the Plaintiff when he bought the property, and that it was therefore entitled to a reasonable notice before it could be called upon to vacate the premises.

This defence was not asserted in Defendant's opposing affidavit, but was pieced together by Mr. Zar from the allegations in the Particulars of Claim, from averments made in the opposing affidavit in relation to other defences. Nevertheless the Court has a discretion in a summary judgment application, and that discretion should be exercised in my view so as to give defendant an opportunity to put up this defence at the trial. In my view, the appeal should accordingly be allowed in respect of the eviction claim.

The Rental Claim

Plaintiff's claim for payment of E1000.00, being the balance of the rental for March 1982, is based on an alleged agreement concluded during February 1982, where Plaintiff says it agreed to grant Defendant a further period of one month's occupation.

The learned Judge a quo held that no defence was disclosed

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because there was no denial in the opposing affidavit of the alleged agreement. It is correct that there is no express denial of the agreement but it is impossible to read the affidavit as a whole without realising that Defendant is contesting the existence of such agreement. The agreement which was alleged to have been extended (the 6 month tenancy referred to in Clause 14 of the Deed of Sale) is itself denied. The obligation to pay E1000 per month is denied. Defendant goes on to aver that:-

"It was at all times a clear understanding between Plaintiff and Defendant that, in so far as the period of the unexpired duration of the (15 year) lease was concerned, it was not negotiable, that Defendant would be entitled to the occupation of the said premises for the full tenure and the balance of the period of the same."

I am of the view that these averments were sufficient to disclose a defence to the claim for payment of an extra E1000 for the month of March, and summary judgment should accordingly not have been granted in respect of this claim.

Costs

The ordinary rule is that a successful party is entitled to costs. I have considered whether this is not a proper case to depart from that rule, because, as regards the eviction claim, Defendant's opposing affidavit did not raise the point which succeeded on appeal. On the other hand, the affidavit did complain about the lack of notice, and leave to defend on the claim for rental should have been given on the defence disclosed in the opposing affidavit. In the circumstances, I do not consider that

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there is sufficient basis for departing from the ordinary rule. I appreciate, however, that when the dispute between the parties reaches a stage when evidence is led, it may be found that the

defences put forward in argument and in the opposing affidavit are not substantiated "by the facts. If that is so, then Plaintiff's remedy will "be to apply to the trial court for an appropriate order as to costs.

I would accordingly allow the appeal, with costs, and order that the judgment of the Court a quo be altered to read:-"The application for summary judgment is refused, with costs. Defendant is to file its next pleading within the time limits provided by the Rules of Court, calculated as if the Particulars of Claim had been served on the date of this Judgment".

SIGHED (8/12/82)

S. AARON

JUDGE OF THE APPEAL COURT

I agree with judgment of AARON J.A. A. for the reasons given by him

SIGNED

for:-

I.A. MAHOMED

JUDGE OP THE APPEAL COURT